IN THE UNITED STATES BANKRUPTCY COURT

FOR THE

SOUTHERN DISTRICT OF GEORGIA
Augusta Division

IN RE:	)	Chapter 7 Case
	)	Number 90-11841
JERRY WAYNE DOSSETT	)	
CYNTHIA DOSSETT	)	
	)	FILED
Debtors	)	at 4 O'clock & 51 min. P.M.
	)	Date: 7-15-91
	)	
JERRY WAYNE DOSSETT	)	
CYNTHIA DOSSETT	)	
	)	
Plaintiffs	)	
	)	
vs.	)	Adversary Proceeding
	)	Number 91-1017
FIRST UNION NATIONAL BANK	)	
	)	
Defendant	)	

ORDER

Debtors, Jerry Wayne Dossett and Cynthia Lee Dossett (hereinafter referred to as "debtors"), bring this action against First Union National Bank of Georgia (hereinafter referred to as "FUNB") seeking a permanent injunction barring FUNB from repossessing debtors' automobile. Debtors purchased a 1989 Honda Civic vehicle, ID No. lHGED3544KAO11704, on November 3, 1988 and financed the purchase through a simple interest retail installment contract with FUNB.

Debtor filed for the protection of this court pursuant to Chapter 7 of the Bankruptcy Code on October 24, 1990. Debtors at the time of filing and at present are current with all payments on the above referenced automobile. Debtors informed FUNB that they would not reaffirm their debt but nevertheless desire to retain the automobile and continue their normal monthly payment schedule. FUNB informed the debtors that absent a formal reaffirmation agreement upon discharge it would demand possession of the automobile.

The issue is whether this court should compel FUNB by injunction to allow the debtors to retain the automobile following discharge without a reaffirmation agreement so long as they are current in their payments under the original loan agreement.

Debtors assert pursuant to 11 U.S.C. §521(2)(A)[1] they have

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[1]11 U.S.C. January 4, 2001521(2)(A) provides in pertinent part:

> (2) if an individual debtor's schedule of assets and liabilities includes consumer debts which are secured by property of the estate
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> (A) within thirty days after the date of the filing of a petition under chapter 7 of this title or on or before the date of the meeting of creditors, whichever is earlier, or within such additional time as the court, for cause, within such period fixes, the debtor shall file with the clerk a statement of his intention with respect to the retention or surrender of such property and, if applicable, specifying that such property is claimed as exempt, that the debtor intends to

four options relative to their interest in property in their Chapter 7 case: retention, surrender, reaffirmation, or redemption. See generally In re: Hunter, 121 B.R. 609 (Bankr. N.D. Ala. 1990).

FUNB contends that under the Bankruptcy Code, debtors may elect between surrender or retention of the collateral and if they elect to retain, they must choose between two options: redemption or reaffirmation. In support of its proposition, FUNB relies on a previous decision of this court. See generally Otis Lee and Mary Tutt Goldsby v. First Union National Bank, (In re: Otis Lee and Mary Tutt Goldsby), Chapt. 7 case No. 88-10215, Adv. Pro. No. 881041 (Bankr. S.D. Ga. Augusta Division, Dalis, J. March 2, 1989). The issue involved in this case is identical to that in Goldsby. Since deciding Goldsby, I have found no Bankruptcy Code revisions or compelling precedent to persuade me to change my position. I respectfully disagree with the Hunter analysis and reiterate my findings in Goldsby. Following discharge, absent reaffirmation or redemption, the original contract between the creditor and the debtor, including any default upon filing bankruptcy clause, determines the respective rights of the parties to the collateral under applicable state law.

It is axiomatic that the bankruptcy laws disfavor ipso

> redeem such property, or that the debtor intends to reaffirm debts secured by such property.

facto clauses which purport to entitle a creditor to call due an indebtedness solely on account of a bankruptcy filing. However, there is no general provision in Title 11 that invalidates an ipso facto clause for all purposes under Title 11. Under Title 11, the

scope of the invalidation of ipso facto clauses is limited in duration to the pendency of the bankruptcy case and limited in application to specific circumstances. Under 11 U.S.C. §363(1), a trustee may use, sell, or lease property of the estate notwithstanding an ipso facto default clause which attempts to prevent the debtor's property from becoming property of the estate solely on account of the filing for relief. In addition, §541(c) includes as property of the estate that property in which the debtor has an interest as of the filing date notwithstanding an ipso facto clause which attempts to destroy the debtor's interest upon filing. Also, §365(e) refuses to give effect to an ipso facto clause in executory contracts or leases.

The rationale for suspending such clauses during the pendency of a case is self-evident: the debtor or the trustee, as the ease may be, needs sufficient time to consider his options as to liquidation or reorganization without risking the loss of property through the mechanistic operation of an ipso facto default upon bankruptcy filing clause in a contract, lease, or security

agreement. The benefits of bankruptcy law protection would be largely illusory if the debtor's estate could be stripped of a valuable property interest at the instant of filing. Thus the court in Riggs Nat. Bank of Washington D.C. v. Perry, 729 F.2d 982 (4th Cir. 1984) refused to grant a lift of stay where the creditor depended upon the default on bankruptcy filing clause to prove its

entitlement to relief

The salutary effect of invalidating or suspending ipso facto clauses during the pendency of a Chapter 7 case is lost when the debtor receives a discharge or the case is closed. At such time, property of the estate is either distributed, abandoned, or revested in the debtor. Executory contracts or leases have been either effectively rejected or assumed. The trustee has either sold, leased, or abandoned the property of the estate. The question remaining is, why should the terms of the agreement enforceable under state law not be given effect? The debtors contend that the enforcement of such agreement terms impedes the fresh start contemplated under Chapter 7. See Hunter, supra; In re: Peacock, 87 B.R. 657 (Bankr. D. Colo. 1988). The Peacock court cited the undue bargaining power a creditor would have in negotiating a reaffirmation of debt, which seriously disadvantages the debtor seeking to start a new financial life. The court in In re: Horton,

15 B.R. 403 (Bankr. E.D. Va. 1981) stated:

> What justice is there in condoning snatching the vehicle -- or any property -- when the creditor is chagrined because the borrower filed bankruptcy? To provide otherwise will give rise to the birth of the bankruptcy clause as a tool or weapon against those who file bankruptcy.

Id. at 405. See also In re: Schweitzer, 19 B.R. 860 (Bankr. E.D.N.Y. 1982).

While the positions taken by the courts in Hunter, Horton, and Peacock enumerate legitimate concerns for a meaningful fresh start, this court finds no basis for the issuance of the permanent injunction sought by the debtors. The stay which prevents a creditor from pursuing a valid state law cause of action against a debtor, or property of the debtor, upon the filing for relief under Title 11 is the stay imposed pursuant to 11 U.S.C. §362(a). Under 362(c), this stay as to property expires when the property is no longer property of the estate and, as to any action other than an action against property, upon the earliest of the closing or dismissal of a case or, if the case is a case under Chapter 7 concerning an individual, the time a discharge is granted or denied. There is no provision in Title 11 for the extension of the stay beyond this point. In the present case, the property, an

automobile, is no longer property of the estate and the debtors have sought and, without regard to the outcome of this adversary proceeding, will receive a discharge.

Prior to the termination of the automatic stay under §362(c) a debtor seeking to retain property securing an obligation has two exclusive remedies under Chapter 7 of Title 11. See In re: Bell, 700 F.2d 1053 (6th Cir. 1983). First, the debtor may redeem under 722.

> An individual may . . . redeem tangible personal property intended primarily for personal, family, or household use, from a lien securing a dischargeable consumer debt, if such property is exempted under section 522 . . . or has been abandoned under section 554 . . ., by paying the holder of such lien the amount of the allowed secured claim of such holder that is secured by such lien. 11 U.S.C. §722.

This provision amounts to a right of first refusal for the debtor in consumer goods that might otherwise be repossessed. HR Rep. No. 95-595, 95th Cong., 1st Sess. 380 - 81 (1977). This option entails paying the creditor's secured claim in cash. In re: Carroll, 11 B.R. 725 (BAP 9th Cir. 1981). An assertion that §722 redemption is a "dead letter" because the typical Chapter 7 individual debtor is without sufficient cash to pay off a security interest in order to retain possession of the collateral may be correct from a practical standpoint; however, Congress established this procedure as a debt relief device available to debtors who wish to retain property pledged as collateral for an obligation. This procedure establishes

that the extinguishment of a creditor's right to collateral under a contract must be accomplished with the turnover of the creditor's property interest in the collateral in the form of cash. This right of first refusal is the mechanism established by Congress for a Chapter 7 individual debtor to deal with a creditor who, for whatever reason, refuses to enter into a reaffirmation agreement.

The second general means for collateral retention by a Chapter 7 debtor is to reaffirm the debt which is secured by the collateral pursuant to §524(c)(1).

> (c) An agreement between a holder of a claim and the debtor, the consideration for which, in whole or in part, is based on a debt that is dischargeable in a case under this title [11]
>
> is enforceable only to any extent enforceable under applicable nonbankruptcy law, whether or not discharge of such debt is waived, only
> (1) such agreement was made before the granting of the discharge under section 727 . . . of this title [11].
> 11 U.S.C. §524(c)(1).

Reaffirmation renews the obligation secured by the collateral, notwithstanding the discharge, leaving the debtor personally liable for any post-discharge default. In this manner, the debtor can retain the property without the necessity of an immediate cash payment in full as required under §722 with the quid pro quo of personal liability for the reaffirmed debt. Reaffirmation, like the initial contract between the creditor and the debtor, is a consensual transaction. See In re: Whatley, 16 B.R. 394 (Bankr.

N.D. Ohio 1982). The creditor may never compel the debtor to reaffirm, nor may the creditor be compelled to allow reaffirmation.

An assertion that by virtue of the inequitable bargaining power available to creditors holding non-avoidable security interests in debtor's property such creditor can extract unconscionable terms of reaffirmation is without merit. The procedural safeguards inherent in a valid reaffirmation agreement prevents creditor overreaching. These safeguards include the right to rescind, the need for the debtor's counsel to declare the reaffirmation to be in the debtor's best interest, or where such declaration is not given and the debtor still wishes to enter the reaffirmation, the court must inquire into whether the reaffirmation

is in the debtor's best interest. 11 U.S.C. §524(c)(2),(3),(4),(6) & (d). Under Chapter 7, reaffirmation and redemption are the exclusive remedies available to an individual debtor seeking to retain an automobile which stands as collateral for a debt. Chapter 7 of Title 11 was never intended as a part of a reorganization process whereby contractual modification is one of the debtor's available tools. Chapters 11, 12, and 13 quite clearly are different. See 11 U.S.C. §1123(a)(5), 1222(b)(3) and 1322(b)(3); In re: Miller, 4 B.R. 305 (Bankr. E.D. Mich. 1980).

Following this Chapter 7 case, debtors could file for

relief and obtain confirmation subject to the criteria of §1325 of a plan of reorganization under Chapter 13. Johnson v. Home State Bank, _____ U.S. _____, 111 S.Ct. 2150, _____ L.E.2d _____, 59 U.S.L.W. 4609 (June 10, 1991); In re: Saylors, 869 F.2d 1434 (11th Cir. 1989). If the debtors are unable to redeem or unable to successfully negotiate a reaffirmation agreement in the Chapter 7 case, they may pursue a plan of reorganization and repayment under Chapter 13, thus reimposing the stay of §362(a). This available bankruptcy remedy, Chapter 13, further negates any potential overreaching by a creditor in a reaffirmation negotiation under §524.

As debtors are not entitled to the injunctive relief sought as a matter of law under the Bankruptcy Code, they must rely upon the equitable powers of this court in seeking such relief. 11

U.S.C. §105. The debtors insist that it is equitable and necessary for their fresh start to allow them to retain possession of their automobile so long as they remain current in their payments as contracted without the requirement of reaffirmation under §524 or redemption under §722. Apparently, reaffirmation of the debt with an obligation to make monthly payments somehow adversly impacts upon the debtors' fresh start, but voluntarily making the same monthly payment in order to retain possession of the automobile does not.

This proposition is not logical unless one accepts the lender's premise that the debtors will simply make the payments until the combination of age and use devalues the collateral to a value substantially less than the amount due, at which point the debtors simply walk away leaving the creditor to absorb the loss occasioned by the debtors' post-discharge retention and use of the collateral. This is far from equitable. This was not the risk undertaken by the lender when the loan was made. The transaction between the debtors and FUNB was a promissory note personally obligating the debtors, which personal obligation was secured by the collateral. The intervention of the bankruptcy discharge ends the personal obligation and all that remains is the collateral. See Johnson v. Home State Bank, supra. I see no basis in law or equity for the issuance of an injunction to prevent this creditor from exercising its contractual rights under state law against the collateral following discharge.

It is therefore ORDERED that judgment be entered for defendant First Union National Bank against plaintiffs, Jerry Wayne Dossett and Cynthia Dossett, denying injunctive relief. Nd monetary damages are awarded.

JOHN S. DALIS

UNITED STATES BANKRUPTCY JUDGE

Dated at Augusta, Georgia

this 15th day of July, 1991.